IN THE

Supreme Court of the United States

October Term, 1942.

No. 497.

A. M. ANDERSON, Receiver of the National Bank of Kentucky, of Louisville, - - - - - Petitioner,

versus.

KATHERINE KIRKPATRICK ABBOTT, Administratrix, Et Al., - - - - - - - - Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM W. CRAWFORD,
RICHARD P. DIETZMAN,
ALLEN P. DODD,
JAMES W. STITES,
HENRY E. McELWAIN,
EDWARD P. HUMPHREY,
LAFON ALLEN,
Counsel for Respondents.

Louisville, Kentucky,
November 17, 1942.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

KATHERINE KIRKPATRICK ABBOTT, ADMINISTRATRIX, ET AL., - - - - - *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondents respectfully submit that the prayer of the Petitioner for the issuance of a writ of certiorari should not be granted.

SUMMARY STATEMENT OF FACTS.

In the year 1927, the National Bank of Kentucky, which as a State institution had begun business in 1834 and had had a long and honorable career, was doing business in the City of Louisville as a national banking

institution. The Louisville Trust Company, a Kentucky corporation organized in 1884, was likewise doing business in that city. Believing that an affiliation of the two institutions would result in better banking and trust service to the community, stockholders of the two institutions, in April, 1927, brought about that affiliation by trusteeing most of the stock of the two institutions, excepting necessary qualifying shares for directors. The shares of the two institufions were transferred to trustees, who thus became the legal owners of those shares and stockholders of record of each of the two institutions. The trustees issued to the former stockholders certificates of interest in the trust estate, which are known in this record as "Trustees' Participation Certificates."

In July, 1929, the BancoKentucky Company, a non-banking corporation, was organized under the laws of Delaware. Its declared purposes included the buying and selling of corporate securities, the financing, management or operation of commercial manufacturing, financial or other enterprises, the underwriting of security issues for compensation, the acquisition of corporate securities by purchase, the guarantee of obligations of other persons, firms or corporations and, generally, all the powers conferred upon such corporations by the General Corporation Law of the State of Delaware. The articles of incorporation provided that "private property of the stockholders [should] not be subject to the payment of corporate debts to any extent whatever" and each stock certificate issued by the BancoKentucky Company described the shares

represented by it as being "full-paid and non-assessable."

The BancoKentucky Company acquired various assets, among which were the Trustees' Participation Certificates, which were transferred to it by the owners in exchange for stock of the BancoKentucky Company. In addition to these exchanges, the former holders of Trustees' Certificates subscribed for 178,878 shares of the BancoKentucky Company, for which they paid in cash $4,471,950. The directors of the Bank and the directors of the Trust Company, whose combined maximum liability upon their surrendered Trustees' Certificates in the event of the failure of both the Bank and the Trust Company would have been $761,150, subscribed for 47,188 additional BancoKentucky shares for which they paid $1,179,750 in cash.

In addition to the exchanges and cash sales to former Certificate holders mentioned above, approximately 3,500 outsiders who had not been holders of Bank or Trust Company shares or of Trustees' Certificates, purchased 215,908 shares of the BancoKentucky Company for which they paid in cash $5,397,700. It thus appears that at the opening stage of the activities of the BancoKentucky Company $9,869,650 in cash had been realized from the sale of its shares.*

The Trustees, of course, remained the record holders of the stock of The Louisville Trust Company and the stock of the National Bank of Kentucky and the BancoKentucky Company became the owner of the Participation Certificates.

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*Rec. Vol. I, p. 256; Findings 25-31.

The break in the stock market occurred in October, 1929, followed by the depression. In the summer of 1930 the BancoKentucky Company entered into a transaction with Caldwell and Company, of Nashville, which, upon the failure of Caldwell and Company in November, 1930, led to some unfavorable newspaper publicity with reference to that transaction. This occasioned large withdrawals of deposits from the Bank and on November 17, 1930, it closed its doors and was put in the hands of a receiver. Shortly thereafter, BancoKentucky was likewise put in the hands of a receiver.

The following February, the Comptroller of the Currency made an assessment against the stockholders of the National Bank of Kentucky under the double liability statute. On October 31, 1931, almost a year after the Bank had closed and after the Receiver had had full opportunity to know all the facts surrounding the connection of the BancoKentucky Company with the Bank, the Receiver, after first securing the necessary court permission, sued the BancoKentucky Company for the amount of the assessment upon the Bank shares represented by the Trustees' Certificates held by it, alleging that by reason of its holding of those Certificates it was the real and beneficial owner of Bank shares. This suit was first styled, "Keyes v. Laurent," but is generally referred to in this record as "Laurent v. Anderson." It was resisted by the Receiver of the BancoKentucky Company but resulted in a judgment, first in the District Court* and later by

*Keyes v. American Life & Accident Ins. Co., and Four Other Cases, 1 F. Supp. 512.

affirmance in the Circuit Court of Appeals,* against the BancoKentucky Company, both Courts holding that the BancoKentucky Company was the real and beneficial owner of the Bank stock in question.

THE QUESTION PRESENTED.

Within a day or two of five years after the Comptroller's assessment against the stockholders of the National Bank of Kentucky, the instant suit was brought by the Receiver of that Bank against the stockholders of the BancoKentucky Company, upon the same cause of action which had been asserted against the BancoKentucky Company itself in his former action. Having obtained in the former action a judgment for $3,772,162.40 against the BancoKentucky Company as the real and beneficial owner of the Bank shares represented by the Trustees' Certificates owned by it, the Receiver now shifted his ground and asserted that the holders of BancoKentucky shares were the real and beneficial owners of the Bank shares represented by the Trustees' Certificates held by the BancoKentucky Company. Being founded upon that section of the Bank Act which then imposed a double liability upon the stockholders of national banks, his suit could only be based upon one or more of the following grounds: (1) that the stockholders of the Bank had transferred their shares within sixty days before the failure of the Bank, (2) that they had transferred their shares with knowledge of impending insolvency of the

Laurent v. *Anderson*, 70 F. (2d) 819.

Bank and with intent to escape liability, or (3) that the BancoKentucky Company was not organized in good faith but solely for the purpose of shielding its stockholders against the double liability imposed by the Bank Act.

The Receiver has never asserted the first basis of liability mentioned above. In the District Court, after the evidence was all in, he disclaimed any intention to rely upon the second basis of liabifity mentioned above. It is obvious, therefore, that the only issue in this case was and is one purely of fact, to-wit, whether the BancoKentucky Company was organized and carried on in good faith for the purposes declared in its charter and was not a mere holding company nor organized as an agency of its stockholders or for the purpose of shielding its stockholders from the double liability imposed by the Bank Act.

The District Court heard the evidence introduced, listened to arguments and took the case under submission upon briefs for both sides. After a careful consideration of the record and briefs, it handed down an opinion (Rec. I, p. 228), with full findings of fact (Rec. II, p. 243),* and concluded that the BancoKentucky Company had been organized and carried on in good faith for definite, legitimate purposes and that consequently that Company, and not its stockholders, was the real and beneficial owner of the Trustees' Participation Certificates and the National Bank of Kentucky stock here involved.

*These should not be confused with "Plaintiff's Request" for Findings of Fact, beginning Rec. I, p. 176.

After hearing arguments and considering the briefs and the record, the Circuit Court of Appeals also handed down a full opinion and concluded, exactly as did the District Court, that the BancoKentucky Company was a bona-fide corporation, not created to circumvent any law, but to do the business its charter provided, and was the real and benficial owner of the Trustees' Certificates and the National Bank of Kentucky shares here involved.

CONCURRENT FINDINGS OF FACT BY BOTH COURTS BELOW CONCLUSIVE.

Applying the rule announced many times by this Court in this state of case, the writ should be denied.

In *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, this Court said (p. 178):

> "There is nothing in the lower court's decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. N. C. Public Service Co., 263 U. S. 508. United States v. Johnston, 268 U. S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support." (Citing cases.)

Again, the rule was announced in *Harris* v. *Brundage Co.*, 205 U. S. 160, at page 163:

> "Here, both courts below found that Harris and Odell were agents of the debtor (the Association) and had custody of the Escrow Fund as such agents at the time the petition in Bankruptcy was filed and thereafter. We accept this finding, and proceed to a consideration of the jurisdictional question."

In the still later case of *Just* v. *Chambers*, 312 U. S. 383, the Court again said (p. 385):

> "In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimants' injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the courts below upon these matters (Texas & New Orleans R. Co. v. Railway Clerks, 281 U. S. 548, 558) and we confine our attention to the question of the survival of the causes of action."

ON TWO OTHER OCCASIONS THE PETITIONER OBTAINED AN ADJUDICATION THAT THE BANCOKENTUCKY COMPANY WAS THE REAL AND BENEFICIAL OWNER OF THE STOCK OF THE NATIONAL BANK OF KENTUCKY.

As heretofore stated, the exact question here involved, namely, who was the real and beneficial owner of the Bank shares represented by the Trustees' Participation Certificates held by the BancoKentucky Company, was directly put in issue by the Petitioner here—by the same counsel asking for the writ here—in the suit referred to above, known as *Laurent* v. *Anderson,* which was filed in the United States District Court for the Western District of Kentucky and in which he secured from the District Court and from the Circuit Court of Appeals a finding that the real and beneficial owner of the Trustees' Participation Certificates and the shares of the National Bank of Kentucky here involved was the BancoKentucky Company.

In seeking permission from the State court, having jurisdiction of the BancoKentucky receivership to sue the BancoKentucky Company, the Petitioner here asked leave to sue on the ground that the BancoKentucky Company was the real, true and beneficial owner of the National Bank of Kentucky stock here involved by reason of its ownership of the Trustees' Participation Certificates.

Leave being granted in the terms of the request, a suit was accordingly brought and resisted by the Re-

ceiver of the BancoKentucky Company. In deciding the case, Judge Cochran held as a fact—

> "That the BancoKentucky Company, and the defendant, Joseph S. Laurent, its Receiver, was the actual and real owner of 37,721.624 shares of stock of the National Bank of Kentucky, having a par value of $100.00 per share on November 17, 1930,"*

and gave judgment against the BancoKentucky Company for $3,772,162.40, saying:†

> "Nor is it of any consequence that the BancoKentucky Company never owned in any way any stock in the National Bank of Kentucky and that it acquired its equitable interest therein by purchase of trustees' participation certificates from those who had been such owners and taken them in substitution for their stock. Upon the acquisition of such stock, that company became the beneficial and hence the actual and real owner thereof, and hence subject to assessment."

On appeal to the Circuit Court of Appeals for the Sixth Circuit, that Court affirmed the decision below and in doing so said (p. 822):‡

> "The sole question for determination is whether Banco is liable to respond as a stockholder in the National Bank of Kentucky as the real and beneficial owner of the stock under Title 12, U. S. C. A.,

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*Defendants' Exhibit No. 23.
†1 F. Supp. 512, at 513.
‡70 Fed. (2d) 819.

> Sec. 64, or whether it is exempt from liability under Title 12, U. S. C. A., Sec. 66,"

and answered that question with these statements (p. 824):

> "The evidence establishes that Banco was in every sense the true and beneficial owner of the National Bank stock involved."

Again (p. 824):

> "The petition and especially the evidence sustain recovery against Banco as the real and beneficial owner under section 64 of the National Banking Act (12 U. S. C. A.)."

The *Laurent case*, decided by the Circuit Court of Appeals on May 7, 1934, was cited in *Atherton* v. *Anderson*, which came before the Circuit Court of Appeals in November, 1936. In that case there was presented the question whether loans made by the National Bank of Kentucky, collateraled by Banco-Kentucky stock, were loans on the Bank's own stock and therefore unlawful. The Circuit Court of Appeals, in a very elaborate opinion, set out the formation and history of BancoKentucky Company and reached the conclusion that the BancoKentucky Company was a bona fide corporation, established for a lawful purpose, acting independently of the Bank, and that its stock and the Bank stock were not the same. In the course of its opinion, it called attention to *Laurent* v. *Anderson*, saying:*

*86 Fed. (2d) 518, at 536.

"While in the very beginning the bank stock may, as found by the court [District Court], have been its principal asset, any may have continued thereafter to be its most valuable single asset, it had other assets of very substantial value, and it was warrantable inference at the time of its organization and for a substantial period thereafter that it could well meet any assessment that might be levied upon it as a stockholder of the bank. At any rate there is nothing in the record to point to its creation for the purpose of escaping such assessment. Indeed when the assessment was finally made by the Comptroller it was enforced against Banco and not against the stockholders. See *Laurent* v. *Anderson, supra.* ITS SEPARATE CORPORATE EXISTENCE WAS RECOGNIZED BY THE VERY RECEIVER ON WHOSE BEHALF WE ARE NOW ASKED TO IGNORE IT." (Emphasis ours.)

Although *Atherton* v. *Anderson,* came to this Court and was sent back to the Circuit Court of Appeals for a ruling on another issue in that case, on its return the Circuit Court of Appeals adhered to its ruling theretofore made upon the character of BancoKentucky Company. *Atherton* v. *Anderson,* 99 Fed. (2d) 883, p. 895.

No appeal has ever been prosecuted from the latter ruling, made November 16, 1938, nor was any recovery adjudged or settlement made on account of alleged illegal loans by the Bank on the security of Banco-Kentucky stock.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS HERE AND ITS DECISION IN BARBOUR v. THOMAS.

The petition for the writ here sought seems to suggest conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in *Barbour* v. *Thomas,* 86 Fed. (2d) 510, and its decision in the case at bar. *Barbour* v. *Thomas* was decided the same day that *Atherton* v. *Anderson, supra,* was decided and in the *Atherton case* the Court made an elaborate finding of fact regarding the status of Banco as an independent, bona-fide corporation. A complete answer to the suggestion of conflict between the decision in *Barbour* v. *Thomas,* and the decision in the case at bar will be found in the opinion of the Circuit Court of Appeals in the instant case. It points out with meticulous care the wide differences in the factual situation presented to it in the *Barbour case* and that presented here, which resulted in different, but not inconsistent, conclusions in the two cases.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT IN THE INSTANT CASE AND ANY DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The expression on this point found in Rule 38(b) is, "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals *on the same matter.*" (Emphasis ours.)

There is no such conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit and a decision of another circuit court of appeals. The numerous cases cited by Petitioner (Petition, p. 10) are not "on the same matter." All of these double-liability cases have been decided upon the differing, factual situations involved therein and, as is explained in the opinion of the Circuit Court of Appeals in the instant case, any difference in the conclusion reached does not indicate a difference in the legal principles applied.

The suggestion is also thrown out by the Petitioner that conflicts may arise between the decision of the Circuit Court of Appeals in the instant case and future decisions in other cases which are awaiting the decision of this case.

While quite a few similar suits have been filed by the Receiver in district courts in other circuits against stockholders of the BancoKentucky Company residing in those districts, they involve a relatively small part of the total stock issued by the BancoKentucky Company and, although all of them were filed six or more years ago, all of them, so far as we are advised, are lying dormant, awaiting the decision in this case. In any event, should the petition for a writ of certiorari be denied in the instant case, there is no reason to anticipate that, in cases pending in other circuits, the Circuit Courts of Appeals will not follow the decision of the Circuit Court of Appeals for the Sixth Circuit, which has had the underlying question under consideration so many times. If the mere possibility

that a conflicting decision might be made in the future were adopted as a ground for granting certiorari, almost every case could come to this Court.

NO IMPORTANT RULE OF LAW NOT HERTOFORE DECIDED BY THIS COURT IS INVOLVED HERE.

Respondents have never contested the rule of law frequently announced by this Court, that the real owner of national bank stock, as well as the record holder, can be held liable for an assessment.

Respondent have never contested the proposition that, where a transfer of stock is made to a dummy, with the real ownership still remaining in the transferor, such transfer must be ignored.

Respondents have never contested the proposition that transfers made to an insolvent, with knowledge of the failing condition of the bank at the time of such transfer or transfers within sixty days prior to the failure of the bank, must be ignored.

The Circuit Court of Appeals for the Sixth Circuit has ignored none of these rules.

In the *Laurent case,* in obedience to the first rule above stated, it had affirmed a judgment against the BancoKentucky Company as the real and beneficial owner of the Bank stock in question.

In the instant case, again in obedience to that rule, it has re-examined the question who was the real and beneficial owner of the Bank stock in question and, consistently with its former decision, it has found that the real and beneficial owner was the BancoKentucky

Company, and not its stockholders. In reaching that conclusion, it said:*

> "From our study of the record in this case, we are in accord with the conclusions of the district court that the BancoKentucky Company was not a mere holding company, a sham corporation, or an empty shell; but was a very real and live corporate entity, actively acquiring capital assets; that the corporation was organized for the purposes set out in its prospectus of July 19, 1929, and for no other; that it was conceived in no planned avoidance of double liability assessment upon stock of the National Bank of Kentucky; that the BancoKentucky Company was the true, legal and beneficial owner of the national bank stock; and that its stockholders were not stockholders of the national bank within the meaning of the federal assessment statutes. 38 Stat. 273, 12 U. S. C. A. 64."

THERE IS NO MATTER OF GENERAL PUBLIC INTEREST INVOLVED IN THIS CASE WHICH NEEDS ELUCIDATION BY THIS COURT.

Only the stockholders of BancoKentucky and the creditors of the National Bank of Kentucky are involved. The fact that a considerable sum of money is sought to be recovered certainly does not make the case one of general public interest.

The claim that many defendants, a majority of whom never owned any Bank stock, should be required to pay a sum, in addition to the heavy losses heretofore

*127 Fed. (2d) 696, at 701.

incurred by them, certainly does not present a question of public interest within the meaning of Rule 38.

Certainly, the repeal in 1933 (effective July 1, 1937) of Section 64 of the Bank Act, imposing double liability upon the stockholders of national banks, deprives any case arising under that repealed section of any general, public importance.

The suggestion is made in Petitioner's brief (p. 12) that the failure to repeal the similar section relative to Joint Stock Land Banks leaves the question a live one as to stockholders in such banks. However, a Congressional Act of the same session (12 U. S. C., §810) has forced all Joint Stock Land Banks to liquidate by denying them the right to do new business other than is necessary to liquidate their loans on hand as of May 12, 1933.

NO OTHER REASON COMING WITHIN THE GENERAL PURVIEW OF RULE 38 IS SUGGESTED BY PETITIONER.

Petitioner's "Summary Statement" (Petition, p. 1) attempts to create an atmosphere, which suggests fraud on the part of the organizers of the BancoKentucky Company. In his statement, Petitioner now claims that the Bank was in a failing condition at the time of the organization of the BancoKentucky Company. He made this claim in the District Court and introduced a great mass of documentary evidence relative to the internal condition of the Bank. But when the evidence was all in and he came to write his reply

brief in that Court, he made the following statement (Plaintiff's Reply Brief, p. 84):

> "Although it is affirmed with monotonous regularity, plaintiff has never claimed that the National Bank of Kentucky was insolvent, in any sense of the word, when Banco was organized, and much less that the organizers knew it."

He did not withdraw this disclaimer in the Circuit Court of Appeals.

Having disclaimed in the District Court any intention to charge that the Bank was insolvent at the time of the organization of the BancoKentucky Company and having stood by his disclaimer in the Circuit Court of Appeals, is not the Petitioner precluded from asserting at this time a claim which was not presented to the Circuit Court of Appeals?

In any event, the District Court found in regard to the condition of the Bank at the time of the organization of Banco the following fact:

> "There were irregularities in the handling of some of the credit accounts of the Bank, but the soundness of the Bank and its ability to meet its obligations could not be questioned, until long after the formation of Banco." (Rec., Vol. I, p. 267; Finding 67.)

As a further evidence of this, there was the District Court's finding on the question of the dividends paid by the Bank. The Bank had paid dividends of $160,000 quarterly and its last dividend was paid in

October, less than a month before it closed. In regard to these dividends, the Court found:

> "Not one of the dividends declared and paid by the Bank during the period from April, 1927, to September, 1930, was criticized by the Comptroller of the Currency, either in the letters of the Comptroller to the Bank or in the reports of the Examiner." (Rec., Vol. I, p. 264; Finding 45.)

This finding was never questioned on appeal.

CONCLUSION.

This Court has said that a writ of certiorari will not be allowed simply to give the defeated party in the Circuit Court of Appeals "another hearing."*

It is hard to imagine a case which would come more directly within the terms of this statement than the one we are considering.

A year after the Bank closed and when the Petitioner, with full knowledge of all essential facts, came to enforce the statutory liability against National Bank of Kentucky stockholders, he brought a suit against the BancoKentucky Company alleging that, as the owner of Trustees' Certificates, it was liable to him in the sum of $3,772,162.40.

BancoKentucky not being the record holder of Bank stock, the Petitioner succeeded in satisfying the District Court that the BancoKentucky Company was the "real and beneficial owner" of such stock and

*Magnum Import Co., Inc. v. Coty, 262 U. S. 159, at p. 163.

consequently secured a judgment against that Company for the amount of the assessment.

Later, upon appeal, it convinced the Circuit Court of Appeals for the Sixth Circuit that the BancoKentucky Company was "the real and beneficial owner of its Trustees' Certificates" and of the Bank stock represented by them.

Later, in his suit against the directors of the Bank, the Petitioner raised the question of BancoKentucky stock being the same as Bank stock, for the purpose of attempting to hold the directors liable for loans made in part upon the security of BancoKentucky stock.

The ruling in that case was in accord with the previous ruling which the Petitioner had obtained in the *Laurent case* but contrary to his desires. The Circuit Court of Appeals there held* that BancoKentucky stock was not Bank stock because the BancoKentucky Company was not one of those corporations whose corporate veil would be looked through.

Still later the Petitioner brought a new suit, the one at bar, making a claim exactly contrary to the claim he had made in the *Laurent case*. This time the BancoKentucky Company is not the true owner of Bank stock, but its stockholders are the true owners.

Thus the Petitioner, in three separate suits brought by him, has required the courts to decide the question of the true ownership of the shares of the National Bank of Kentucky. In all of them the courts have answered that the BancoKentucky Company was the true owner, in the first case (the *Laurent case*) in accord

*Atherton v. Anderson, 86 Fed. (2d) 518.

with Petitioner's contention, and in the other two cases (the *Atherton case* and the instant case) against his contention.

Meanwhile, the liquidation of the affairs of the National Bank of Kentucky by the Petitioner has dragged on for twelve years, during all of which time the depositors of the Bank, for whom he professes so much concern, have been deprived of part of the money to which they are entitled.

We suggest that the Receiver of the National Bank of Kentucky is not entitled to still "another hearing."

Respectfully submitted,

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